

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1366

To be argued by
RHEA KEMBLE NEUGARTEN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1366

UNITED STATES OF AMERICA,

B p/s
Appellee,

—v.—

LAWRENCE MORICI,

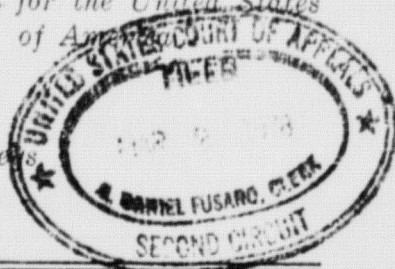
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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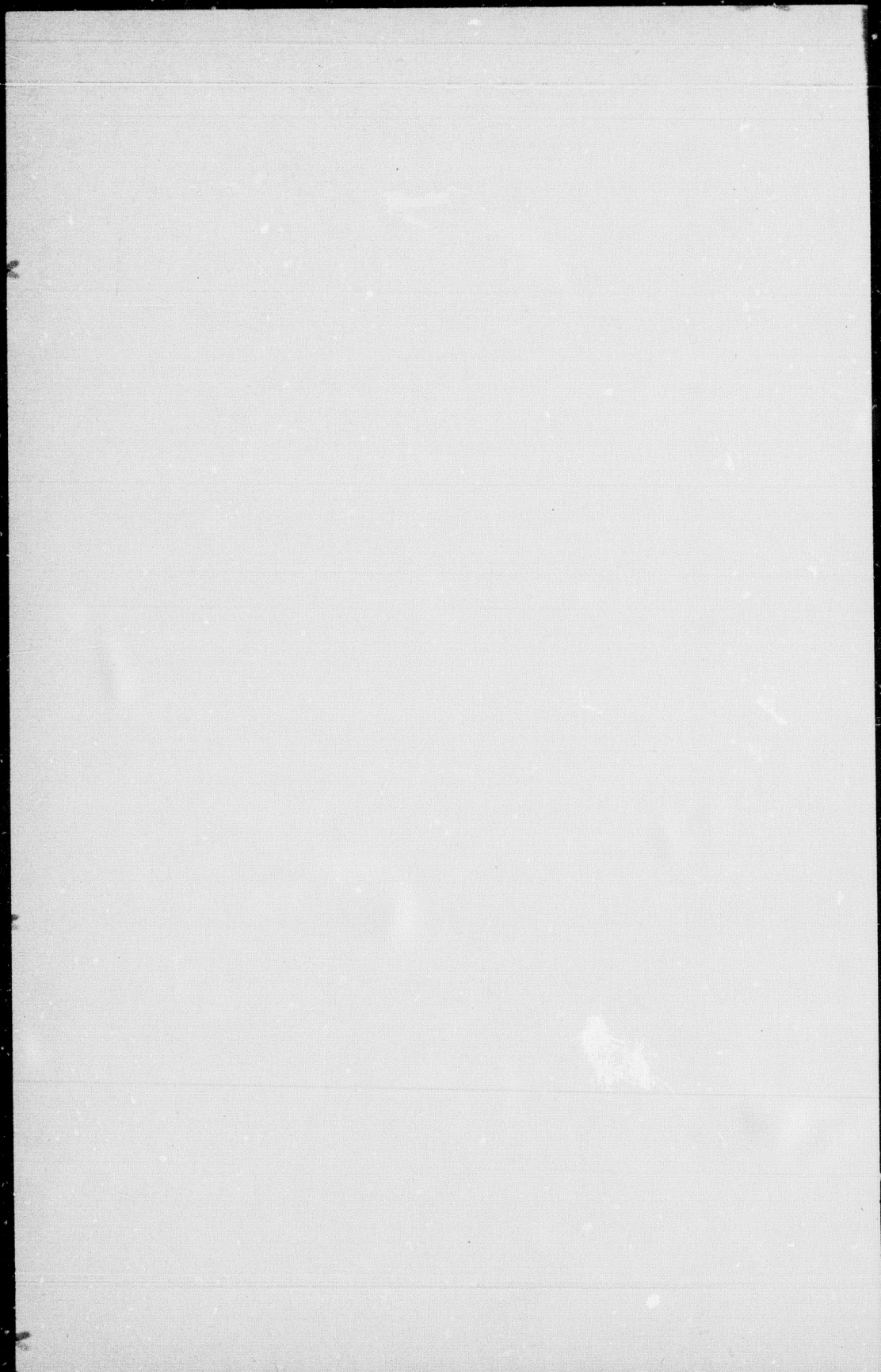


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**United States Court of Appeals
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Docket No. 77-1366

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAWRENCE MORICI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lawrence Morici appeals from a judgment of conviction entered on July 28, 1977, in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Henry F. Werker, United States District Judge, and a jury.

Indictment 77 Cr. 136, filed on February 18, 1977, charged Gjerdj Kalaj, Lawrence Morici, and James Johnson with conspiracy to violate the federal gun control laws (Title 26, United States Code, Sections 5812 and 5861) with respect to the transfer, registration and serialization of firearms known as pen guns, in violation of Title 18, United States Code, Section 371. The indictment also charged Kalaj with three counts (Counts Two, Three and Four) of substantive violations of the gun control laws, specifically the transfer of 100 pen guns without the approval of the Secretary of the Treasury and

the payment of the requisite tax, and the possession of 100 pen guns without registration and serialization, in violation of Title 26, United States Code, Sections 5861 (e), (d) and (i), respectively. Johnson was charged in Count Eight with the possession of three unserialized pen guns in violation of Title 26, United States Code, Section 5861(i). In addition, Kalaj was charged in Counts Five and Six with carrying weapons, a loaded Baretta semi-automatic pistol and a loaded pen gun, respectively, during the commission of a federal felony, in violation of Title 18, United States Code, Section 924 (c) (2). In Count Seven, Johnson was similarly charged with carrying a loaded pen gun during the commission of a federal felony.

Trial as to Morici and Kalaj * commenced on June 7, 1977 and concluded on June 15, 1977, when the jury found Morici guilty of the one count against him, and Kalaj guilty of all six counts in which he was named.

On July 23, 1977 Judge Werker sentenced Morici as a Young Adult Offender pursuant to Title 18, United States Code, Sections 4216 and 5010(a). Imposition of the prison sentence was suspended, and Morici was placed on probation for three years and fined \$2,000. Kalaj and Johnson also have been sentenced. Kalaj has not perfected his appeal.

Morici remains on probation at this time, and has not paid the fine pending appeal.

* Before trial Johnson had pleaded guilty to Count One—the conspiracy count.

Statement of Facts

The Government's Case

A. Summary

On about December 2, 1976 Special Agent Matthew Raffa, of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") of the United States Treasury Department, acting in an undercover capacity, visited the offices of Armory Realty in the Bronx and introduced himself to one Gjerdj Kalaj. Agent Raffa described himself as a co-owner of a trucking business, interested in purchasing a large number of pen gun firearms to be carried by his truck drivers. Kalaj told Raffa he would have no problem in supplying the guns.

Thereafter, Kalaj and Raffa conducted negotiations over a period of several weeks. On December 20, 1976 they finalized arrangements for Raffa to purchase 100 pen guns for \$2,400. That same day Kalaj accompanied his colleague, defendant James Johnson, to Brooklyn, where Johnson made arrangements with defendant Lawrence Morici for Kalaj and Johnson to buy the guns from Morici for \$600. Johnson picked up the guns from Morici later that night so that Kalaj and Johnson could complete the sale to Raffa.

On the following day Raffa met Kalaj and Johnson at the real estate office. As Raffa and Kalaj left the offices to pick up the guns, Johnson handed Kalaj a loaded pen gun with which to protect himself. Kalaj however was already wearing a concealed, loaded, Baretta semi-automatic revolver. Kalaj delivered the guns to Raffa, and was arrested as he counted the money. Johnson was arrested moments later, and two unloaded pen guns were found clipped to his breast pocket.

After Johnson was arrested, he agreed to place recorded telephone calls to Morici as part of a plan for Raffa to make a further purchase that night directly from Morici. In these conversations Morici referred to the weapons as guns, and agreed to sell one hundred additional guns to Raffa. Later that night Raffa met with Morici in Brooklyn, and Morici explained that his supplier not only had pen guns, but other weapons as well, including machine guns. Morici's attempts to contact his supplier were fruitless, and Morici was arrested before the additional sale was consummated.

B. The Raffa-Kalaj Negotiations

On December 1, 1976 Agent Raffa, acting in an undercover capacity, visited Armory Real Estate in the Bronx. (Tr. 66).^{*} When Raffa was informed by co-defendant Johnson that Kalaj was not there, Raffa agreed to come back another time. (Tr. 67).

On the following day Raffa met Kalaj and told Kalaj that he had heard Kalaj was in the business of selling pen gun firearms,^{**} and that he wanted to buy 40 of them. (Tr. 69). Raffa's undercover story was that he and his father were in the carting or sanitation business on a nonunion basis, and that he needed to arm the 40 persons who drove and operated the firm's trucks, because

^{*} The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; "A" refers to Morici's appendix on this appeal; and "Br" refers to Morici's brief on this appeal.

^{**} Pen guns are so named because of their outward resemblance to fountain pens. They have carrying clips, like a pen, and when worn in a breast pocket with only the top half exposed, appear to be pens. However, they are not so innocent: the pen guns sold by Kalaj to Raffa could fire a .22 long rifle lead cartridge and were also capable of emitting tear gas.

they were being physically harassed by representatives of union shops. (Tr. 69).

Kalaj responded that there would be no problem in supplying Raffa with the necessary guns. (Tr. 70-71). Kalaj claimed that he had furnished thousands of pen guns primarily to the Yugoslavian and Albanian communities in the Bronx, in lots of varying amounts, and that the price could vary from \$15 to \$70 per pen gun, depending on the circumstances. (Tr. 70-71). Kalaj described the guns he sold as about five inches long, easily concealable, and more dependable than a .38 caliber pistol in that the bullet with which the pen gun was loaded, although small, could penetrate a thick telephone book. (Tr. 73-74). Raffa and Kalaj agreed on a price of \$1200 for 40 guns. (Tr. 71-72).

Thereafter Kalaj and Raffa had a series of telephone conversations. By December 6, 1976 Raffa expressed concern about the delay, and Kalaj reassured him that although he was having "a little bit of trouble getting [the guns]," there was no cause for worry because Kalaj would indeed obtain them. (Tr. 80). As time progressed, Raffa suggested that he might have potential customers, and inquired about increasing the order from 40 to 100 pen guns. (Tr. 80-81). Kalaj was willing, and agreed to sell the additional 60 to Raffa at a cheaper price, bringing the total to \$2400 for 100 pen guns. (Tr. 81-82).

In the course of the telephone negotiations Kalaj revealed that his supplier lived in Brooklyn and in turn obtained his guns from a "factory", where one could buy anything from semi-automatic pistols to machine guns. (Tr. 85-86). This conformed with Kalaj's earlier representation that filling the 100 gun order would take more time, because the additional guns would have to be made. (Tr. 81).

On December 20, 1976 Raffa heard from Kalaj four times. In the first conversation Kalaj said the guns were ready, and thereafter all four conversations were devoted to haggling over payment terms. (Tr. 86-88). Kalaj initially demanded the whole \$2,400 up front, then said he would be satisfied with a \$1,200 pre-payment, but then reduced his demand to \$600, saying that the supplier required it. Raffa suggested that Kalaj provide the supplier with \$600 of his own funds as an advance, to be covered by the \$2400 which Raffa would give Kalaj on delivery. In the fourth call, Kalaj accepted Raffa's proposal and told Raffa he was going to pick up the guns. They agreed to consummate the transaction the next day.

C. The Sale and The Seizures

Apparently between the third and fourth calls on December 20th, Kalaj and Johnson had driven to Brooklyn to finalize arrangements with Johnson's connection, Lawrence Morici (Tr. 141, 511-12, 607, 616) who in turn would be getting the guns from the "factory." (Tr. 142). After a disagreement over whether there was to be any pre-payment (Tr. 515), Morici apparently agreed to be satisfied with \$300 up front. Johnson borrowed Kalaj's car, returned alone to Brooklyn later that night, delivered the \$300 to Morici (Tr. 141), picked up the guns from him and put them in Kalaj's car. (Tr. 519, 616-17).

The next morning Kalaj called Raffa to say he had the guns. (Tr. 88-89). In telephone conversations later that morning they finalized plans to do the transaction at about 1:00 that afternoon. (Tr. 189).

Under surveillance (Tr. 281), Raffa visited the real estate offices. (Tr. 94). Kalaj explained to him that the guns were temporarily unavailable as Johnson had taken Kalaj's car to show prospective tenants a building. (Tr. 95-96). While they waited, Kalaj showed Raffa a telephone

book with numerous, deep holes, which Kalaj claimed were the result of test-firing pen guns into the book. Kalaj also gave Raffa 24 rounds of .22 long rifle lead cartridges, to be used with the pen guns. (Tr. 114, 319; GX 2A through 2V).* Kalaj's demonstration of the weapons' capabilities was supported by the subsequent testimony of Agent Gunnar Erickson, the ballistics expert called by the government.**

Eventually Johnson returned to the real estate office. Kalaj informed Raffa that he was ready to consummate the deal (Tr. 103), and Kalaj and Raffa began to leave the office. As they walked past Johnson's desk, Johnson opened his jacket and took out three pen guns from his breast pocket (Tr. 103), and handed one to Kalaj—saying, "Here, this one is loaded, you may need it". (Tr. 103). As Kalaj and Raffa walked towards the cars, Raffa unscrewed the barrel on the pen gun, observed that it was loaded with a .22 caliber round and returned it to Kalaj. (Tr. 104).

Kalaj took a box from his car (Tr. 104), and when Raffa opened the box he found a large quantity of unserialized pen guns (Tr. 104, 110). Raffa then stepped

* .22 long rifle cartridges have more powder and a heavier projectile than either .22 short or .22 long and hence are more potent.

** Erickson testified that after being test-fired each of the pen guns was capable of reuse. (Tr. 358). Erickson noted that the pen guns (which, when clipped to pockets, resemble a fountain pen) are easily concealable, have no sporting usage, and are strictly an offensive or defensive weapon at short distances (Tr. 347), capable of killing a human being. In fact, Erickson himself had investigated "many, many" homicides in which the victim was killed by a pen gun. (Tr. 357). Erickson explained that the 100 pen guns actually sold to Raffa were of a much higher quality than the thousands of pen guns he had previously seen in his work in ballistics.

out of the Corvette, reached for the money and gave the signal for the arrest. (Tr. 105).

When Kalaj was arrested, a loaded Baretta semi-automatic pistol was taken from his waistband. (Tr. 107, 117, 314, 318; GX 4). At that time, the loaded pen gun, which Kalaj had placed on the dashboard of the Corvette, was also recovered (Tr. 106, 110; GX 3-A), and later test-fired successfully. (Tr. 304-05). Johnson also was placed under arrest, and the two unloaded pen guns remaining in his breast pocket were seized from him (Tr. 109, 124; GX 6A and B) and later successfully test-fired (Tr. 303-04). The 100 pen guns in the box were also taken by the agents (Tr. 108), marked (Tr. 111), and as a sample of the 100, ten were successfully test-fired later using .22 Remington short lead cartridges. (Tr. 307, 317).^{*} Erickson formed the opinion that in addition to being able to fire a "shot" or bullet, the pen guns could also disseminate tear gas (Tr. 320-21), inasmuch as "[a]ny firearm that is capable of discharging a projectile also has gas disseminating ability". (*Ibid.*)

D. Further Dealings Directly With Morici

After Johnson was arrested, he consented to make several recorded calls to Morici (Tr. 125) in order to arrange for Raffa to purchase additional pen guns directly from Morici. During the course of three telephone conversations (See GX 9, 10, and 11), Morici agreed to sell 100 guns to Raffa that night, but warned that he had been unable to contact his supplier to make the necessary

^{*} Erickson formed the opinion that the guns sold by Kalaj were weapons or devices capable of being concealed on the person from which a shot could be discharged through the energy of an explosive. (Tr. 317).

arrangements.* Morici referred to the firearms directly as "guns" (GX 11 at 4) only once. Morici's conversation with Johnson was guarded, and Morici was concerned about dealing directly with Raffa—he asked Johnson if Raffa could be trusted. (See GX 11). Finally Morici agreed to meet Raffa later that evening and to sell Raffa 100 additional guns.

While under surveillance, Morici met Raffa that night. (Tr. 16, 139-40). Morici explained to Raffa that the connection wasn't "there" yet, but that his son went to a bar every night at 47th Street and Seventh Avenue in Brooklyn, and that Morici could try to find him there. (Tr. 141). Morici also asked for the \$300 which Johnson and

* In the first conversation (See GX 9), Johnson told Morici that the deal went "okay" and that he had "the money and everything [and] that this guy's interested in more stuff". Johnson asked Morici if he had anything else. Morici's immediate response was to ask whether Johnson had the \$300 that Kalaj and Johnson still owed Morici for the first \$300. Johnson said he did and that Morici would get it that night. Johnson asked if Morici could "get another hundred" "right away". Morici responded, "Give me the money, you got 'em". In the second conversation (See GX 10), Johnson reiterated that his customer wanted another 100, and suggested that since Johnson would be tied-up with a real estate client, maybe the customer (who turned out to be Raffa) could meet Morici alone, and take him the \$300 Johnson owed him. Morici agreed to try to contact his supplier about getting the extra 100.

In the final conversation (See GX 11), Morici lamented that he had been unable to contact his supplier by telephone, but offered to try to go find him at the place where he and Johnson obtained the guns the night before, and then to go with the supplier to the "shop" to pick-up the guns. Morici reminded Johnson that the customer was to bring the money and also specifically asked Johnson if he trusted the customer. When Johnson said he did, Morici pressed him to be sure, and when told that the customer was a friend of Johnson's salesman (Kalaj) remarked, "Then he's got to be all right." Morici expressly referred to the weapons as "guns". (GX 11 p. 4.)

Kalaj owed him (Tr. 142), and Raffa gave him three pre-serialized \$100 bills. (Tr. 143). Raffa told Morici that he was very impressed with the workmanship on the pen guns, that Kalaj had given him ammunition for the guns, and that Raffa had test-fired them successfully in the river. (Tr. 147). Raffa also asked if Morici could sell anything other than pen guns, and Morici said that the man in the factory (which Raffa recalled Morici had referred to as the "shop") could probably "do" a couple of machine guns, and that Morici could sell 100 pen guns a day. (Tr. 142).

Under surveillance, Morici left Raffa in order to locate his supplier of guns. At one point Morici telephoned Raffa to tell him that the "kid whose father makes the pen guns" had not shown up yet. (Tr. 146).

At about 10:00 p.m., Morici returned and met Raffa again. (Tr. 147). He explained that the "kid" had never shown up at the bar, but volunteered to try again the next night. (Tr. 148). Morici told Raffa that he could supply Raffa with 100 pen guns a day, and that the supplier had machine guns available if the money was there. (Tr. 149). At that point Morici was arrested.

E. Morici's Statements

Following Morici's arrest, he was advised of his rights on several occasions. (Tr. 19-20, 150, 154, 298; GX 15, 16). Morici orally and in writing acknowledged that he understood each of the rights. (Tr. 20-22, 154, 298; GX 16). The agents attempted to secure Morici's cooperation in order to find out his supplier's identity. (Tr. 298-99). Morici responded falsely to the agents' questions (Tr. 626-31), contending that he knew nothing about guns, but rather only sold blue jeans. (Tr. 24, 155-56, 299). When shown a picture of the pen guns, he denied any knowledge of them. (Tr. 24). When the three \$100 bills were seized,

Morici claimed they were his. (Tr. 23). When agent Raffa questioned Morici about the conversations which they had that night, and reminded him that they had not discussed blue jeans at all, Morici still persisted in his story that he was just in the business of selling jeans. (Tr. 156).

The next day Morici was interviewed by an Assistant United States Attorney and again advised of his rights. (Tr. 156-58). When asked for his telephone number, Morici gave the same number which Johnson had dialed before each of the three recorded conversations the previous day. (Tr. 158).

F. The Gun Violation

The Government proved that Morici, Johnson and Kalaj had no weapons of any kind registered to them in the National Firearms Registration and Transfer Record ("Record") and that the pen guns, which were required to be registered, were not, and that the required application to transfer them had not been filed. (Tr. 372-378). The representative of the Record testified that if the pen guns had a diameter of less than one-half inch, as they did, and could *not* fire a projectile, they would not have to be registered.

Defendants' Case

Both defendants Morici and Kalaj testified, and called several additional witnesses. Since this brief only relates to Morici's appeal we do not detail Kalaj's testimony or the testimony of his witnesses.

Generally Morici admitted that on December 20, 1976 he had sold to Johnson and Kalaj 100 tear gas pen guns similar in appearance to the 100 sold to Raffa the next day. However, Morici contended that they were not

identical, inasmuch as the guns Morici had sold allegedly had smaller apertures in the barrels. Morici also contended that he only thought of the weapons as tear-gas guns, and not guns capable of firing a bullet. He explained away his false exculpatory statements as a way of getting the agents to cease their allegedly persistent questioning.

Specifically Morici claimed that several months before his arrest he met an individual he knew only as "John." (Tr. 613, 655-56). On several occasions commencing shortly before his arrest he purchased small quantities of pen guns from "John" (Tr. 615), which he then resold to friends. (Tr. 607-610). Morici contended that before the 100-gun transaction with Johnson and Kalaj, he had sold co-defendant Johnson a total of only six guns on two occasions. (Tr. 606-07).

Morici admitted meeting Raffa and negotiating to sell 100 pen guns. (Tr. 624-27). However, Morici denied discussing machine guns or other weapons. (Tr. 627). Morici was not asked—nor did he deny—whether Raffa had told him that he had test-fired the pen guns into the river, which would be an unlikely way to fire tear gas, but a sensible way to test bullets.

Morici further admitted talking to the agents after his arrest. Morici testified that he said the \$300 pre-marked bills were his because he "felt" they were. (Tr. 630). Moreover, Morici contended that he felt harassed by having a large number of agents trying to interview him, and claimed to them that he only knew about blue jeans in order to get them to leave him alone. (Tr. 631). Morici admitted in direct-examination that he never thought the \$300 was for blue jeans, and always knew it was for pen guns. (Tr. 626-27).

The thrust of Morici's testimony was that the only pen guns which he ever sold had a smaller barrel opening than those in the guns sold to Raffa, and Morici produced and

identified three such barrels. (Tr. 605, Def. Morici's Exhibits E1, 2, and 3).^{*} Morici denied ever having sold anything with the wider openings in the barrels like those in the 100 guns seized from Kalaj. (Tr. 604, GX 1 through GX 1-100).

Morici however admitted that he had thought about the possibility that these pen guns with the smaller barrel opening could fire a .22 bullet. While Morici denied that he had personally test-fired a .22 out of the pen guns (Tr. 611), he acknowledged that he knew that one of his customers had test-fired the pen gun using a .22 (Tr. 650) because the customer had come looking for a replacement after the firing had "destroyed" the gun. (Tr. 610). Thus, Morici knew that the gun with the smaller opening *could* fire a .22, although by his testimony, he would have regarded it as an unsatisfactory weapon since it could only be used once.

Despite having had training in "all different sorts" of weapons in his three year Army career (Tr. 635), and despite his knowledge that permits are required for various guns (Tr. 644), Morici testified that it never crossed his mind that tear gas pen guns might be illegal. (Tr. 646). Moreover, while Morici first admitted having tried to purchase tear gas cylinders from a sporting goods store (Tr. 652), he failed to answer the question asked regarding whether he had been successful. (Tr. 646). Instead, he simply volunteered that he knew a "flea market" where he could buy them. Yet, Morici

^{*} Earlier, Erickson, the Government's ballistics expert, had been shown the three barrels during cross-examination by Morici's counsel. Erickson explained that the barrel with the smaller opening could be screwed into the base of any of the 100, and thus substituted for the barrels as actually sold to Raffa (Tr. 353), and vice versa. Erickson also noted that with an electric drill someone could convert the smaller openings to larger ones. (Tr. 354). But, he also said that a factory or shop that could manufacture the barrels with larger openings, could manufacture the others as well. (Tr. 358).

denied knowing that the sale of tear gas cylinders was illegal in New York City.

The Rebuttal Case

Before commencing its rebuttal case, the government mentioned outside of the jury's presence that it would recall Agent Erickson to testify about several matters, one of which was the illegality under local law of the possession of tear gas guns and the purchase of tear gas cylinders. To abrogate the need for that portion of the testimony, and recognizing, over Morici's exception, that proof that tear gas guns are not "inherently innocent" was relevant under *United States v. Freed*, 401 U.S. 601 (1971), (Tr. 693-95), the Court took judicial notice of the fact that:

"the Administrative Code of the City of New York requires a license, or a permit, rather, with respect to tear gas guns, and that you cannot obtain ammunition for tear gas guns unless you are a police officer." (Tr. 696).

Erickson testified to having successfully test-fired the pen guns using the sample barrels which Morici had claimed were identical with the ones he had delivered to Johnson. (Tr. 698-701). Erickson explained that he had tried both a conventional .22 short Remington lead cartridge such as could be purchased at any store that sells ammunition, (Tr. 698), as well as a smaller projectile, namely a .22 short which Erickson had shaved down with a pen knife. (Tr. 701). Erickson performed three tests using the same barrel and produced it undamaged in court. (See Tr. 900). One of the tests was conducted in front of Morici and his lawyer. (Tr. 700). Indeed, on cross-examination Morici had admitted to having seen the barrel with a smaller opening being successfully test-fired, with no injury to Erickson, anyone else or the gun. (Tr. 634-35).

Erickson also testified that although he had not tried .22 long and .22 long rifle ammunition, it was his opinion that they, too, would fire through the smaller opening. (Tr. 710).

SurRebuttal

Morici called Lawrence Gorman, a ballistics expert, as a surrebuttal witness. (Tr. 730). Gorman testified that although he had not test fired the gun with the smaller barrels (Tr. 737) that in his opinion it would be "extremely dangerous" to fire them, because they might fracture. (Tr. 732-735). On cross-examination Gorman admitted that by using a smaller projectile than a .22 lead cartridge (i.e., by using a .22 shot cartridge rather than a .22 lead cartridge) the guns could be more safely fired. (Tr. 737-738). Gorman admitted that even firing with small shot, the weapon would still be "expiring a shot with the energy of an explosive" (Tr. 738) and hence be a firearm, within the meaning of the relevant statute.

A R G U M E N T

POINT I

The District Court Properly Instructed the Jury and Morici's Defense Was Presented Fully To the Jury.

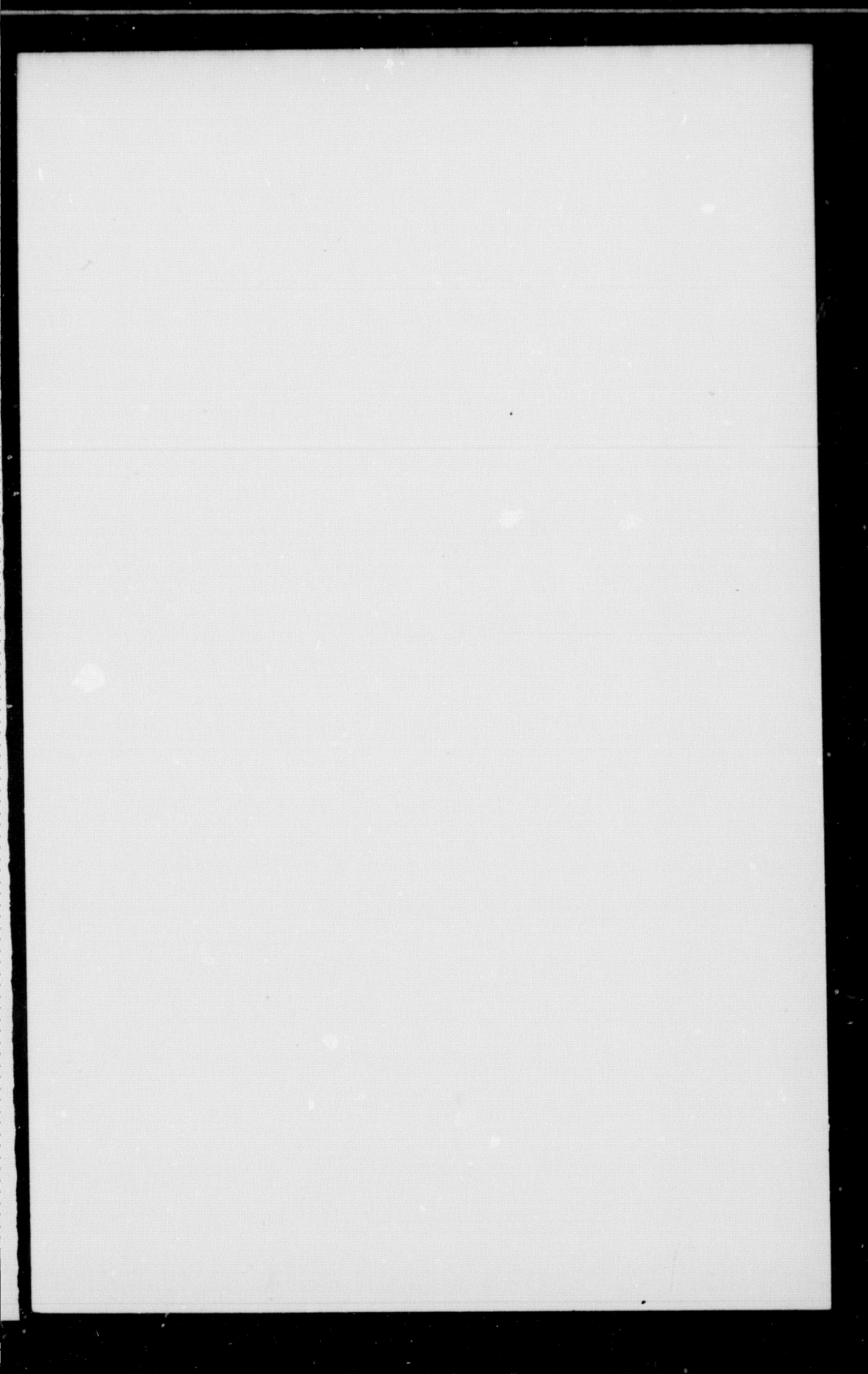
Morici contends that it was error for the District Court to refuse to give his requested charge that if the jurors had a reasonable doubt that Morici knew that the guns could fire a .22 calibre bullet, they must acquit. Morici also urges that the Government must show a degree of criminal intent in the conspiracy count greater than is necessary to convict for the substantive offense of possessing and transferring firearms in violations of 26

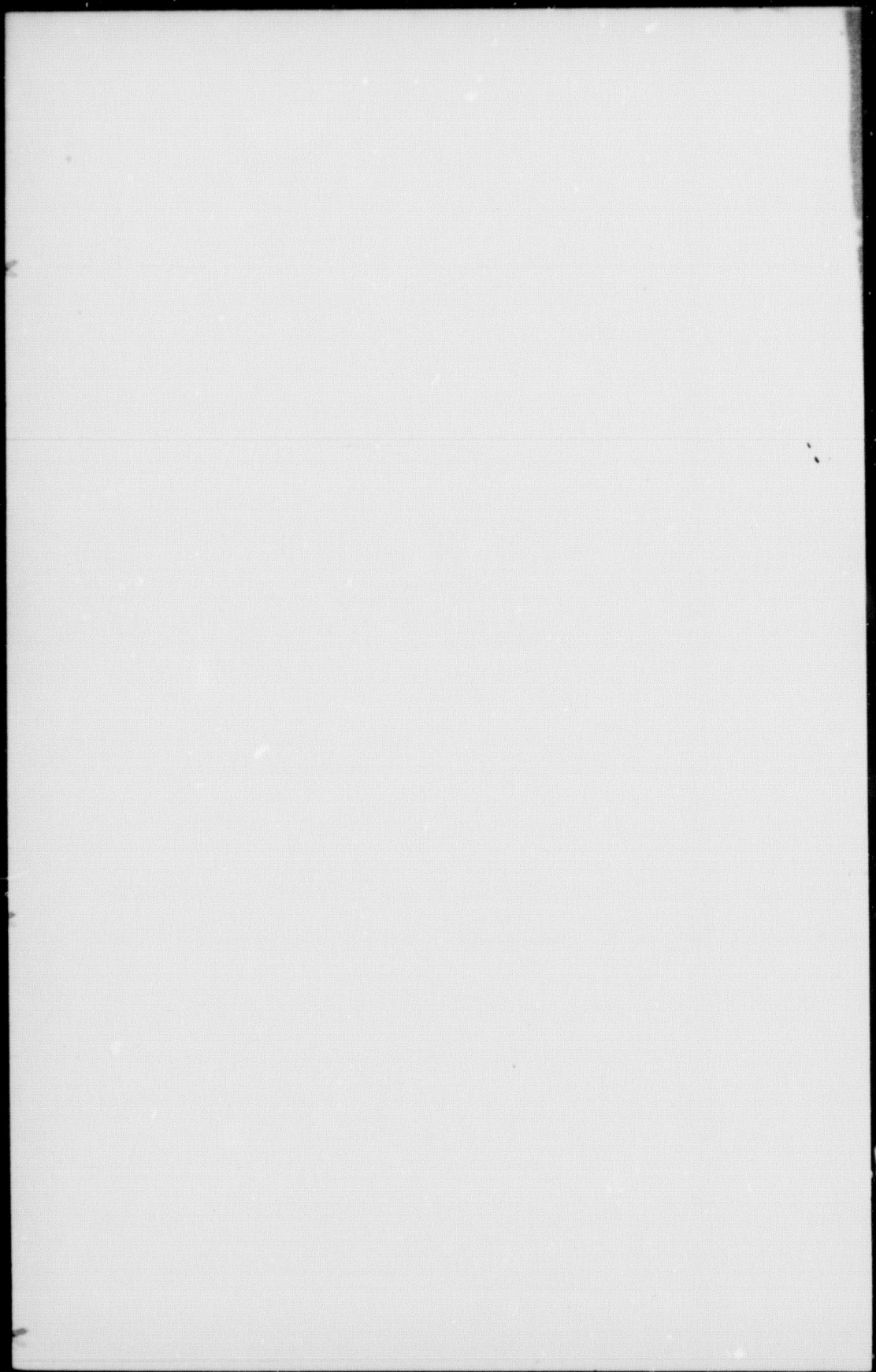
U.S.C. § 5861. Thus Morici concludes that he lacked the requisite knowledge to commit conspiracy because he viewed these weapons as tear gas pen guns, although he knew that to someone else, they had potential for firing a .22 calibre shot. He also contends that the charge as given was erroneous. These arguments are without merit.

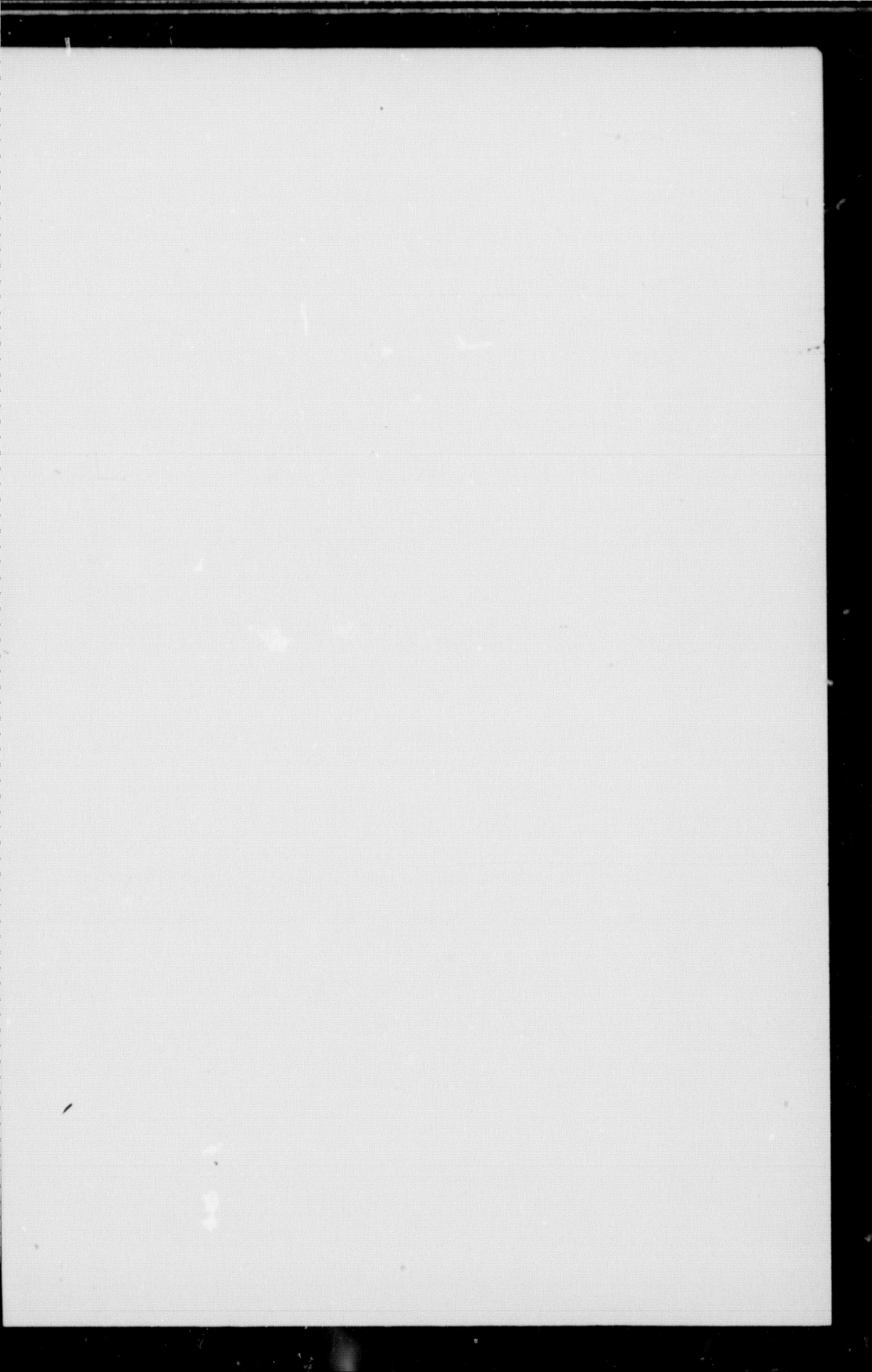
Morici's defense was that he believed the pen guns which he had sold to Johnson were capable of only discharging tear gas and were not capable of firing a bullet. Accordingly he argues that he lacked the criminal intent to conspire to violate 26 U.S.C. § 5861. Assuming that Morici's claim constituted a legal defense to this charge, his contention that the jury was not apprised fully of this defense is simply inaccurate.

The simple answer to Morici's claim on appeal is that he was not prevented from advancing this defense. He testified at length, unimpeded by any objections, concerning his belief that the pen guns could only discharge tear gas and that such guns were legal. (Tr. 600-32). The theme of Morici's summation was that Morici believed his actions were lawful because he never thought he was selling guns. (Tr. 777-96).

Moreover, Judge Werker's instructions did not remove this defense from the jury's consideration. The jury was instructed that the Government had to prove beyond a reasonable doubt that Morici joined the agreement knowing of the agreement's unlawful purpose. Specifically he told the jury that the object of the conspiracy charged against Morici was "to unlawfully transfer firearms . . . or to unlawfully receive or possess a firearm." (Tr. 820). The jury was instructed that a conspiracy was an agreement "to accomplish a criminal or unlawful act . . . through criminal or unlawful means" (Tr. 820). The District Judge further explained that for a conspiracy to exist at least two people must "come to a common









"If the accused possesses such a firearm, the offense is complete. It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute. *Scienter* is not required." *United States v. Decker*, *supra*, 292 F.2d at 90.

Moreover, in *United States v. Thomas*, *supra*, the defendant had requested a "mistake of fact" jury instruction based on his claim that he believed the gun was an antique incapable of firing a bullet, and such an antique gun was not a "firearm" within the meaning of 26 U.S.C. §§ 5845 and 5861. In fact the gun was not an antique, was capable of firing a bullet, and, therefore, was a "firearm" within the meaning of Title 26. The Court of Appeals upheld the trial court's refusal to give the instruction on the ground that mistake of fact was not a defense and the Court's instruction as given was correct. The Ninth Circuit reiterated the logic and language of the First Circuit's opinion in *United States v. DeBartolo*, 482 F.2d 312 (1st Cir. 1973), which is applicable to the facts of this appeal:

"The Government need not prove that a defendant knows he is dealing with a drug or a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril. A shotgun in today's society plainly falls within this category. One knowingly participating in the sale of such a lethal instrumentality cannot escape liability by failing to inspect the length of its barrel any more than by failing to inquire into whether it is registered." *United States v. DeBartolo*, 482 F.2d 312, 316-17 (1st Cir. 1973).

Similarly when Morici dealt with a clearly dangerous device such as a pen gun he acted at his peril and he can not escape criminal liability because he failed to inspect the pen gun to see if it was capable of firing only tear gas.*

Relying on *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941) Morici argues that there is a greater scienter requirement for conviction of conspiracy than conviction on substantive counts. Since Judge Werker fully charged that to convict Morici of conspiracy the Government had to prove that he joined the agreement aware of its unlawful character, Morici's argument as to the vitality of the *Crimmins* rule is somewhat besides the point. However, the Supreme Court in *United States v. Freed*, *supra*, 401 U.S. at 609, n.14 foreclosed Morici's argument. *Freed* involved a conviction for possession of and conspiracy to possess hand grenades. The Court declined to require a greater degree of intent for conspiracy than for the substantive offense because "[a]n agreement to acquire hand grenades is hardly an agreement innocent in itself." Similarly Morici's agreement with Johnson and Kalaj to transfer pen guns or tear gas guns was not innocent in itself.**

* Indeed in *United States v. Thomas*, *supra*, the defendant's statements as to his belief that the weapon was perfectly proper were held to be irrelevant, and the Court of Appeals upheld the trial court's refusal to admit the statements. Here Morici was permitted to offer his testimony relating to his belief that the pen guns were legal, and the District Court did not remove his defense from the jury.

** The *Freed* ruling is in accord with other case law holding that the fact that a conspiracy is charged adds no further scienter requirement to the substantive elements. *United States v. Feola*, 420 U.S. 671, 692, 693-4, (1974) (involving an assault on a federal officer); *United States v. Green*, 523 F.2d 229, 233 (2d Cir. 1975) *cert. denied*, 423 U.S. 1074 (1976), (statute prohibiting theft of goods in interstate commerce did not require scienter, nor did conspiracy violation); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976) (*per curiam*) (wrongful conduct

[Footnote continued on following page]

In sum Morici was given every opportunity to present what is essentially an ignorance of the law defense to the jury. In view of the inherent danger posed by the pen gun Morici sold he acted at his peril. Morici was convicted by a jury fully cognizant of his defense, and adequately instructed on the law.

POINT II

Morici's Right To A Fair Trial Was Not Denied By The Failure To Immunize A Defense Witness.

Morici contends that the Government's refusal to seek an immunity order for co-defendant Johnson, who had pleaded guilty to conspiracy and who had refused to testify at Morici's trial by asserting his privilege against self-incrimination, deprived Morici of his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process of witnesses. Morici further argues that Judge Werker erred in permitting Johnson to assert his Fifth Amendment privilege. Finally, Morici claims that the District Court improperly precluded him from calling as a witness the Assistant United States Attorney

sufficient without need for specific intent in conspiracy violation in interstate commerce). Moreover, the Supreme Court in *United States v. Feola* reversed a Second Circuit decision based on *United States v. Crimmins*, 123 F.2d 271 (2d Cir., 1941) which had required such a scienter element in conspiracy convictions under interstate commerce law. See also *United States v. Schwartz*, 464 F.2d 499, 510 (2d Cir.) cert. denied, 409 U.S. 1009 (1972) (involving an anti-hypothecation statute). Furthermore, Morici's argument that conspiracy requires a greater *mens rea* than conviction for the substantive counts relies on the line of cases commencing with *United States v. Crimmins*, which has been substantially criticized, if not actually overruled by *United States v. Feola*, *supra* 420 U.S. at 689-91 (1974). See also, *United States v. Viruet*, *supra*.

who represented the Government at Morici's trial, so she could testify pursuant to Rule 804(b)(3), Fed. R. Evid., as to certain hearsay statements Johnson had made to her. Each of these claims is without merit.

A. Factual Background

Following Johnson's arrest, his attorney began plea negotiations with the Government. The attorney sought to have Johnson placed in a deferred prosecution program or be permitted to plead to a misdemeanor. (Tr. 682-83). Prior to finalization of a plea agreement and in anticipation that Johnson might testify for the Government at Morici's and Kalaj's trial, an Assistant United States Attorney held lengthy conferences with Johnson. Specifically, she spoke to him on May 31, 1977, and June 1, 2 and 3, 1977, with at least one witness present on all occasions but the 31st. (Tr. 681). In the course of these conversations Johnson's account of the background for his gun dealing relationship with Morici and Kalaj departed significantly from the facts which he had provided the night of his arrest; his account of the critical events changed. The prosecutor concluded that Johnson was now lying and accordingly did not call him as a witness in the Government's direct case. (Tr. 388).

Since a portion of what Johnson told the Assistant United States Attorney could be construed as information helpful to Morici's defense, during the week before trial, the Government notified Morici's counsel that based on conversations between the trial prosecutor, Assistant United States Attorney Rhea Neugarten and co-defendant Johnson, the Government believed that Johnson had information which the defense might construe as exculpatory. (Tr. 381, 393-94). The Government also provided counsel with the name of Johnson's attorney, and suggested that defense counsel consult with him. (Tr. 414-15).

Prior to Morici's trial, Johnson pleaded guilty to Count One, conspiracy, and the Government promised not to oppose a motion to dismiss the two open and related substantive counts at the time of sentencing. (Tr. 383).

During the trial the Government did not call Johnson as a witness. When the defense called Johnson as a witness out of the jury's presence, he asserted his Fifth Amendment privilege, and said he would continue to do so "with regard to each and every question". (Tr. 406). Judge Werker upheld Johnson's assertion of his privilege, having earlier heard the government's representation that not only did Johnson still have two counts open against him, but that he could still be prosecuted for further substantive counts corresponding to Counts Two through Four against Kalaj. (Tr. 382-84). Judge Werker had also noted that collateral crimes might be involved, and that Johnson could be prosecuted under state law as well. (*Id.*).

B. The District Court Properly Upheld Johnson's Assertion of His Fifth Amendment Privilege.

As a preliminary matter Morici challenges the propriety of Johnson's assertion of his Fifth Amendment privilege. He contends that in light of Johnson's plea to the conspiracy count and the Government's representation that the open substantive counts would be dismissed at sentencing, Judge Werker erred in upholding Johnson's Fifth Amendment right not to answer Morici's and Kalaj's questions. After reviewing the circumstances surrounding Johnson's assertion of the privilege, it is clear that the privilege was asserted properly because the privilege should be upheld unless it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answers cannot possibly have such tendency to incriminate." *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (emphasis in

original), quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881). See also *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).*

Under this Court's decision in *United States v. Domenech*, 476 F.2d 1229, 1231 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973) Morici's claim that Johnson improperly asserted his Fifth Amendment privilege must fail. In *Domenech*, the defendant called co-defendant Pereira as an exculpatory witness (*Domenech, supra*, 476 F.2d at 1232, fn. 3), but Pereira asserted his privilege. Pereira earlier had pled guilty to conspiracy to distribute narcotics, but the substantive distribution count remained "outstanding against him but was fully expected to be dismissed upon sentencing." *Id.* at 1230-31. Under these circumstances, this Court *held* that:

"the claim of privilege was well-taken. Count 2 still remained open against Pereira and his testimony, whether or not it helped Domenech, could very well have further incriminated himself on that offense. Though it was very likely that Count 2 would be dismissed, that had not yet occurred and Pereira can hardly be faulted for taking the most cautious position. Even on the conspiracy charge

* While Morici does not argue that he is entitled to a new trial because he was precluded from arguing that Johnson was available to the Government, he complains in his brief that the Court did not treat Johnson as a witness available to the Government. Given Johnson's valid assertion of his privilege, he was unavailable to both sides, even though the Government could have sought immunity and compelled his testimony. Hence there was no obligation on the Court to give a "missing witness" charge, treating Johnson as available but uncalled by the Government. *United States v. Bautista*, 509 F.2d 675, 678 (9th Cir.), *cert. denied*, 421 U.S. 976 (1975); *Morrison v. United States*, 365 F.2d 521 (D.C. Cir. 1966). *Cf. United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied*, 425 U.S. 902 (1976), (citing *Bautista* and *Morrison* with favor, although for a different proposition). Nor was it improper for the District Judge to preclude counsel from commenting on Johnson's absence. *Bautista, supra* 509 F.2d at 678.

to which he had pleaded guilty, evidence compelled at Domenech's trial could well hamper a possible attempt by the witness to withdraw his plea before sentence. . . . Moreover, under the existing precedents it was open to the State of New York to prosecute Pereira on the same heroin transaction (*Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L.Ed. 2d 684 (1959)) and his Fifth Amendment privilege included a right against self-incrimination under the state penal laws. See *Kastigar v. United States*, 406 U.S. 441, 456-57, 92 S. Ct. 1653, 32 L.Ed. 2d 212 (1972); *United States v. Chandler*, 380 F.2d 993, 997 (2d Cir., 1967). In short, if Pereira had refused a direct order to testify, a contempt judgment against him could not be allowed to stand since in no way would it be perfectly clear that the answers would not possibly incriminate. *Hoffman v. United States*, 341 U.S. 479, 488, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); *United States v. Chandler*, *supra*."

Most, if not all, of those reasons are applicable here. While the Government had agreed not to oppose a defense motion to dismiss the open counts against Johnson, that was no *guarantee* that the court might not on its own deny the motion, although it was "very likely" that would not happen. This apparently was also the case in *Domenech*, which involved the "common practice" utilized by the United States Attorney's office in the Southern District of New York. Since Johnson's guilty plea had been entered the day before trial, a Rule 32(d) motion to withdraw the guilty plea was still possible. Moreover, while under New York law Johnson's guilty plea to conspiracy undoubtedly barred state prosecution for *that* crime, he *might* even as to the Kalaj-Raffa sale still have been prosecutable for any or all related substantive crimes under the New York gun control laws (e.g. N.Y. Penal Law Sections 265.05, 265.10), if the elements were differ-

ent than for conspiracy. See N.Y. CPL § 40.20(2) (a) and (b); See also *United States v. Feola*, 420 U.S. 671, 692 (1975) (distinguishing the purposes and elements of conspiracy and substantive crimes). The fact that under *People v. LoCicero*, 14 N.Y. 2d 374 (1964), successful prosecution would be unlikely did not render it "perfectly clear" that Johnson had nothing to fear.

Moreover, Johnson could well fear federal prosecution for what Judge Werker termed "collateral crimes." Johnson had not been charged with the illegal transfer or failure to register the pen guns, as had Kalaj, and the Government had made no promise to Johnson respecting those crimes. The conspiracy to which Johnson had pled was narrow in time—only charged as lasting from November 20, 1976 through December 31, 1976. Thus, there was no double jeopardy bar to prosecution for offenses before or after that time. Given that Johnson had originally admitted that he had often acted as an intermediary between Morici and Kalaj, and given that proof of those dealings would effectively destroy both Kalaj's and Morici's defenses and would cast doubt on the credibility of the story which Johnson was expected to render on direct examination, the Government clearly would have cross-examined Johnson as to his prior gun dealings. If he admitted these dealings, he could be prosecuted for them on that basis, both on a federal or state level. If he denied them, he could be charged with making false statements to government officers in violation of 18 U.S.C. § 1001 or with perjury. Thus under *Domenech*, the privilege was valid. See also *Corbin v. Federal Deposit Ins. Corp.*, 74 F.R.D. 147 (E.D.N.Y. 1977) (Platt, J.) (extended *Domenech* to proposed testimony in a civil proceeding).

Nor are Morici's counter-arguments valid. The inference that *Domenech* is no longer the law because it was not cited in *United States v. Wilson*, 488 F.2d 1231 (2d Cir.

1973), is frivolous. (Br. 31). Morici's bald assertion that *Wilson* discussed the "issue presented by the facts of this case" is groundless. The cited footnote in *Wilson* only raised the question of whether "a guilty plea immediately and completely ends the privilege [on that and merged counts] even though sentence has not yet been imposed." *Wilson, supra*, 488 F.2d at 1233, fn. 3. The opinion does not even suggest that there were open counts, probably because the only counts which were open charged "the same offenses under a different subsection of Section 2113 of Title 18, United States Code," the bank robbery statute. As the government conceded, the guilty plea barred prosecution on the open counts because they were lesser included offenses, merged into the subsection to which the plea was taken. *United States v. Marshall*, 427 F.2d 434, 435 fn. 2 (2d Cir. 1970); Govt's Brief in *Wilson* at 7. That is not the case with the conspiracy and substantive counts here. Nor was the government's position in *Wilson* contrary to that taken here. (See Br. at 32). Both Judge Werker and the government assumed, *arguendo*, that Johnson had no assertable privilege as to the one count to which he had pleaded guilty.*

* The cases cited by Morici are entirely different from the instant case. In none of these cases did this Court reach the question of whether a guilty plea to one count bars the privilege as to open counts, and indeed, generally as to the criminal conduct and circumstances as to a part of which the plea was entered. *United States v. Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972) (because co-defendant never was called as witness, trial court had no opportunity to probe witness' alleged reasons for asserting the Fifth Amendment, and never had to make a ruling as to propriety of the expected assertion); *United States v. Scalfani*, 487 F.2d 245 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973) (while trial judge issued tentative opinion that he would not uphold privilege, the co-defendant never was called as a witness, hence the trial judge never decided the issue, and this Court did not comment on the tentative ruling); *United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958) (witness

[Footnote continued on following page]

C. Morici's Due Process Rights Were Not Violated By The Government's Refusal To Immunize Johnson.

Morici contends that the Government's refusal to grant immunity to co-defendant Johnson violated Morici's due process rights. Morici's claim must fail because as Judge Werker correctly observed, the judiciary cannot compel the executive to seek immunity, and the judiciary may not confer immunity without application by the executive. (Tr. 596-98). Moreover, the Government's refusal to confer immunity on Johnson was entirely proper, and Morici's claims relating to the importance of Johnson's testimony to Morici's defense are exaggerated.

Courts have consistently held that the discretion to apply for immunity is vested in the executive branch, and the judicial branch cannot compel the executive to confer immunity. The seminal case in this area is *Earl v. United States*, 361 F.2d 531 (2d Cir. 1966) (Berger, J.), *cert. denied*, 388 U.S. 921 (1967), and every court which has considered the issue since *Earl* has followed its holding. See *United States v. Bautista*, 509 F.2d 675, 677 (9th Cir.), *cert. denied*, *Monsivais v. United States*, 421 U.S. 976 (1975); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), *cert. denied*, 421 U.S. 999 (1975); *United States v. Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974) (Stevens, J.), *cert. denied*, 420 U.S. 932 (1975); *Cerda v. United States*, 488 F.2d 720, 723 (9th

had pleaded guilty to the whole indictment); *United States v. Anglada*, 524 F.2d 296 (2d Cir. 1975) even where potential witness was the government informant who had not been charged with the crime in question and who may have been protected from "a criminal charge in the Anglada transaction because [he] was acting at the Government's request," this Court only suggested that if the situation arose again on re-trial the trial court was to "take a harder look at any blanket assertion of privilege." *Id.* at 300.

Cir. 1973); *United States v. Jenkins*, 470 F.2d 1061, 1063-1064 (9th Cir.), *cert. denied*, 411 U.S. 920 (1972); *Morrison v. United States*, 365 F.2d 521, 523-524 (D.C. Cir. 1966); *United States v. Berrigan*, 482 F.2d 171, 190 (3rd Cir. 1973). See also in *Re Daley*, 549 F.2d 469, 479 (7th Cir. 1977) and cases cited therein.

In *Earl*, the defendant was charged with selling heroin along with one Frank Scott. The defendant called Scott to the stand, but Scott asserted his privilege against self-incrimination. The defendant made an offer of proof that Scott, if given immunity, would testify that he did not know the defendant and that on the date of the narcotics transaction in question he was not with the defendant but was with someone who looked like the defendant. The prosecution declined to give Scott immunity, and Scott contended that the prosecution had denied the defendant a fair trial in violation of the Due Process Clause. The Court of Appeals for the District of Columbia held that since the prosecution had not affirmatively withheld a witness or concealed evidence the defendant's due process rights were not violated.*

While this Court has not ruled on the precise issue raised in *United States v. Earl*, *supra*, this Court's opinion in *United States v. Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), *cert. denied*, 425 U.S. 902 (1976) clearly states that the Government was not obligated to grant prospective defense witnesses immunity so they could be called to testify. In *Stofsky*, the prospective witnesses were never actually called by the defense and, therefore, did not actually assert their Fifth Amendment privilege.

* Since the Government informed Morici about Johnson's partially exculpatory statements, the Government fully complied with its obligation pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. See *United States v. Marquez*, 462 F.2d 893, 895, fn.3 (2d Cir. 1972).

Defendants argued that these prospective witnesses were unavailable to the defense because they undoubtedly would assert their Fifth Amendment privilege, but were available to the Government because the Government could grant immunity. On appeal the issue was raised about the propriety of the defendants' and prosecutor's comments in summation about the failure to call these witnesses. During summation, the Government in response to a defense argument had stated that these prospective witnesses could have been subpoenaed by the defendants to testify. In ruling that the Government's argument was not improper, this Court further observed that the Government was not "obligated to grant immunity to the [prospective defense witnesses] so that they could be called to testify." *United States v. Stofsky*, *supra*, 527 F.2d at 249.* See also *United States v. Housand*, 550 F.2d 818, 824 (2d Cir. 1977). Similarly, the Government was not obligated to confer immunity on co-defendant Johnson.

Indeed, the Government has found only one case which put the Government to the choice of either immunizing a defense witness or facing dismissal of its case. *United States v. Morrison*, 535 F.2d 223 (3rd Cir.), *cert. denied*, *Boscia v. United States*, 429 U.S. 824 (1976). In *Morrison*, the court found that the prosecutor's pre-trial interviews with the prospective defense witness were so intimidating as to amount to misconduct and that because they caused an apparently previously willing witness to retreat to Fifth Amendment cover, those interviews (not the failure to grant immunity) "infringed [the] defend-

* Morici's claim that the issue of whether the Government could be compelled to grant immunity was not briefed in *Stofsky* is simply wrong. (Br. 26). Citing many of the cases cited above, the Government expressly argued that "the Government is under no duty to grant a prospective defense witness use or transactional immunity to permit him to testify." Govt's brief in *Stofsky* at 103.

ant's constitutional right to have [the witness'] freely-given testimony." *Id.* at 228. The Court held that having created this problem by its misconduct, the government in a retrial could redeem itself only by securing the witness' testimony—i.e., by granting her immunity. Otherwise, a judgment of acquittal was to be entered.*

Certainly, nothing in this case suggests that the failure to grant immunity was a denial of due process, or even unfair. There were legitimate reasons not to offer immunity. Because the government would have rigorously cross-examined Johnson about his prior gun dealings and his relationships with Kalaj and Morici, the possibility of uncovering crimes beyond the narrow six-week conspiracy charged in the indictment was real, and hence the prospect of an "immunity bath" was unattractive. Moreover, where the Government forms the opinion that a witness is lying, it seems *against* the interests of justice to make that witness available to commit perjury. Nor is it any answer to say that even if immunized, the witness can still be prosecuted for perjury. Proving the perjury collaterally may well be difficult, so the witness may well succeed in getting a good deal for himself (by being allowed to take a plea to less than all counts), *then* getting his friends and co-defendants off the hook, and not ever having to pay the price for his acts. It may well be largely because this potential situation is fairly common, and the results so drastic to

* Apparently the only suggestion that immunity may be compelled in other than extraordinary circumstances comes from Judge Bazelon. See the individual, non-precedential "statement of reason" appended to the *per curiam* order denying rehearing *en banc* in *United States v. Gaither*, 539 F.2d 753, (D.C. Cir. 1976). Given that *Gaither* was affirmed without opinion, (see 535 F.2d 1325 (D.C. Cir., 1975)), Judge Bazelon's fear that in *that* case the immunity decision might have affected the fairness of the proceedings was a view not shared by his brethren on the bench.

law enforcement, that it has been flatly held that *Brady* does not require that a witness be immunized in order to bring exculpatory material to the jury. *People v. Sapia*, 41 N.Y. 2d 160, 165 (1976).

A closer look at Johnson's proposed testimony undermines Morici's claim that he was deprived of an essential witness by the failure to seek immunity. While some of Johnson's potential testimony would have helped Morici, the statement that Johnson had received the box in a sealed condition from Morici and delivered it sealed to Kalaj (Tr. 681) would have undercut Morici's defense that the guns were not in a condition that they could have fired a bullet when he delivered them to Johnson. Johnson's statements that Kalaj and "the boys" showed him how the original four pen guns fired 22's tended to show that the guns Morici provided were identical to those sold to Raffa—thereby devastating Morici's credibility. Finally, if Johnson had testified, the Government would have been able to cross examine Johnson with the statements he made after his arrest which were inconsistent with his trial testimony. These statements included references to Johnson's frequent use as an intermediary between Morici and Kalaj for the sale of pen guns. (Tr. 388).

D. The District Judge Properly Ruled That Johnson's Statements To An Assistant United States Attorney Were Inadmissible Under Rule 804 (b)(3), Fed. R. Evid.

Morici contends that the trial judge erred in refusing to admit Johnson's statement to Assistant United States Attorney Neugarten under the declaration against penal interest exception to the hearsay rule. Since Johnson's statements failed to satisfy the requirements of Fed. R. Evid. Rule 804(b)(3) and standards enunciated by this Court in *United States v. Guilette*, 547 F.2d 743, 754

(2d Cir. 1976), Judge Werker properly excluded proof of these statements. Certainly this ruling on the exclusion or admission of evidence did not constitute an abuse of discretion. See *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*); *United States v. Guilette*, *supra*; *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

While Johnson's attorney was attempting to convince the Government that Johnson should be placed in a deferred prosecution program or be allowed to plead to a misdemeanor, Johnson was interviewed by an Assistant United States Attorney. During the interviews, Johnson said that before December 20, 1976 he had received pen guns on only one occasion from Morici (Tr. 388), that on that occasion Morici had offered to get tear gas shells for them (Tr. 393) and that Morici had always referred to the objects as "tear gas pen guns." (Tr. 393). Johnson further contended that he had given four of those six guns to Kalaj. (Tr. 386). Johnson also said that at a later point Kalaj and the "boys in the office" showed him how the guns would fire .22 caliber ammunition. (Tr. 686). Morici contended that these remarks corroborated his contention that he and Johnson had treated the guns as *only* tear gas guns, and that it was not until Kalaj became involved that Johnson learned of their capability for firing .22's. However, this remark also incriminated Morici, in that it showed that the guns Morici provided were the same as those sold to Raffa later.

Judge Werker properly exercised his discretion in not admitting the evidence because it failed to meet Rule 804(b)(3) requirements that (1) the statement at the time made was so contrary to the declarant's penal interest that a reasonable man in his position would not have made the statement unless he believed it to be true and (2) that there be corroborating circumstances clearly indicating the trustworthiness of the statements when offered to exculpate the accused.

As the trial judge stated, it is "unrealistic" to call the statements sought to be admitted ones "against the declarant's penal interest except in a formal sense." (Tr. 609-691). In contrast to the statements Johnson made to ATF agents at the time of his arrest, Johnson's later statements made to Assistant United States Attorney Neugarten sought to minimize the extent of his illegal activity. Whereas upon arrest, Johnson said he had often acted as an intermediary between Kalaj and Morici on pen gun orders (Tr. 388), he told Mrs. Neugarten of only one prior instance of transferring guns from Morici to Kalaj and mentioned that Morici always referred to them as "tear gas pen guns." Since Morici testified at trial that he thought the sale of pen guns capable *only* of firing tear gas was not even a local crime, it is not inconceivable that Johnson believed the same, or would have so argued. Moreover, the admission of one prior transaction involving a total of only six guns was far less damning than admission of several large prior deals, which was the inference to be drawn from Johnson's arrest night statements. Therefore, Johnson may have thought he was exculpating rather than inculpating himself, by his statements to Assistant United States Attorney Neugarten.

The context in which the statements were made also gives a strong indication that Johnson made the statements in furtherance of his own interests rather than against his interests. He was then in the course of negotiating for a deferred prosecution or a misdemeanor plea, rather than a felony. Finally, the story related to Mrs. Neugarten was consistent with a potential entrapment defense, inasmuch as Johnson stated that Raffa had pressed Kalaj for the guns. In sum, the circumstances in which the statements were made and the fact that Johnson minimized his involvement in criminal activity negate the idea that Johnson's penal interest was at stake such that

a reasonable man would not have made such statements unless he believed they were true.*

Moreover, there were not sufficient corroborating circumstances to indicate the trustworthiness of the statements within the standard set by this Court in *United States v. Guillette*, 547 F.2d 743, 754 (2d Cir. 1976).** As we have demonstrated the statements are not really against the declarant's penal interest, but at the time given were designed to further his interest by minimizing his involvement in order to secure a deferred prosecution or a misdemeanor plea. Furthermore, since Johnson made his statements months after his arrest and to a federal official with whom he was negotiating for lenient treatment the circumstances surrounding the statements contrast sharply with the third party confession made in *Chambers v. Mississippi*, 410 U.S. 284 (1975), to friends

* Assuming *arguendo*, that the statements were against penal interest and are admissible, in the circumstances of this case, they still should not have been admitted. To do so would require the prosecutor herself to testify, a procedure inappropriate except in exigent circumstances. *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974). Here, there were no exigent circumstances, since Morici's counsel was on notice four days prior to trial of the possibly exculpatory information (Tr. 381-382), but it was not until the third day of trial, after unexpectedly seeing Johnson in the hallway, that the defendants expressed their desire to call the Assistant United States Attorney as a witness. The obvious problem of placing the prosecutor's credibility in issue after having presented the case, outweighs any defense claim of necessity for this particular testimony.

** In *United States v. Guillette*, *supra* this Court reiterated the four factors deemed relevant by the Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284 (1975) in determining the trustworthiness of third party confessions: 1) the time of the declaration and the party to whom the declaration was made; 2) the existence of corroborating evidence in the case; 3) the extent to which the declaration is really against the declarant's penal interest; and 4) the availability of the declarant as a witness.

shortly after the murder. Here, there was both sufficient opportunity and motive to fabricate a story to suit both the declarant's interests, and those of his co-defendants.*

Finally, the record of the case is void of evidence that would corroborate Johnson's statements. Morici offers his own testimony as corroboration, which, not surprisingly, is consistent with Johnson's story.** The testimony of parties which have such a great interest as a criminal defendant is hardly the type of independent corroboration envisaged by the Rule. Indeed, Congress revised the draft of the rule to upgrade the corroboration requirement from simple corroboration, so that the "accused's own testimony" would not by itself meet the test. See Notes of Committee on the Judiciary, H. R. Rep. No. 93-650, Note to Subdivision (b) (3) at 28 U.S.C.A. Fed. R. Evid. 804, U.S. Cong. & Admin. News 1974, pp. 7051, 7089. Further doubt as to the veracity of Johnson's statement is cast by his prior inconsistent statements to agents at the time of his arrest. The very danger that Congress sought to guard against by requiring corroboration is that the third party confession tending to exculpate a defendant is the result of fabrication. See Advisory Comm. Notes, Fed. R. Evid. 804(b) (3); *United States v. Guilette*, *supra*. The danger of fabrication is real in this

* Johnson made his statements to Mrs. Neugarten on May 31, 1977 and June 1, 2 and 3, 1977. He did not plead guilty to the felony count until June 6, 1977.

** The suggestion that because one of a large number of agents chose to call the weapon "tear gas pen guns" is not corroborative. The government always conceded that the weapons could fire tear gas, as well as .22's. There was no suggestion that Agent Dugan ever doubted their ability to fire .22's, which was all that was at issue under the statute. Indeed, the fact that the agent called them "tear gas pen guns" while knowing they could fire .22's *negates* the inference that from Morici's reference to them similarly as tear gas pen guns it followed that Morici did *not* know they could fire "a shot."

case since that possibility has not been sufficiently precluded by corroborating evidence.

Therefore, the Government submits that under these circumstances, the trial court did not abuse its discretion in finding the statements untrustworthy and therefore inadmissible hearsay.* (Tr. 688-91).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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* Even if this Court should find that some part of the statement constituted a declaration against penal interest admissible under Rule 804(b)(3), Morici's purposes would be defeated because under *United States v. Marquez*, 462 F.2d 893 (2d Cir. 1972) the portions of the statements not against penal interest are severable. Therefore, a portion of the statements which exculpate Morici might also exculpate the declarant Johnson and should be excluded in any event. Only that part of the statement which is against the declarant's interest possesses the inherent trustworthiness which justifies an exception to the hearsay rule. See also, *United States v. Seyfried*, 435 F.2d 696, 697-698 (7th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

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COUNTY OF NEW YORK) ss.:

Rhea Kemble Neugarten being duly sworn, deposes and says that She is employed in the office of the United States Attorney's Office for the Southern District of New York.

That on the 2d day of March, 1978
She served ^{two} copies of the within Brief on Appeal
by placing the same in a properly postpaid franked envelope
addressed:

Martin Erdmann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
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New York New York 10007

attn:
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And deponent further says that She sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York. 10007

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Sworn to before me this

2nd day of March 1978

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